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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

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OPINIONS BELOW

The opinion of the Court of Appeals (App. B, pp. 1a-40a)[1] is not yet reported. The letter ruling of the Federal Communications Commission dated June 2, 1967 (App. A, pp. 14-17) is reported at 8 F.C.C. 2d 381, and its Memorandum Opinion and Order on reconsideration, adopted September 8, 1967 (App. A, pp. 37-105), is reported at 9 F.C.C. 2d 921.

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[1] "App." refers to the separately bound Appendix to this petition and the petitions in three related cases, forty copies of which have been filed with the Clerk of this Court. "J.A." refers to the printed Joint Appendix in the court below, also duly certified to this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1968 (App. B, pp. 41a-43a). Petitioner American Broadcasting Companies, Inc., as a broadcast licensee and the operator of nationwide radio and television networks, participated as a "party in interest" in the proceedings before the Federal Communications Commission and as an "intervenor" in the court below (28 U.S.C. Sec. 2348). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and 28 U.S.C. Sec. 2348.

QUESTIONS PRESENTED

1. Whether action by the Federal Communications Commission ordering radio and television stations that carry routine product advertisements for cigarettes[1] to devote a "significant amount" of broadcast time "each week" to warning the public of the hazards of cigarette smoking impinges upon the free speech guarantees of the First Amendment, and the no censorship prohibitions of Section 326 of the Communications Act—in situations where the Commission, in taking the action it did, can point to no statutory standard more specific or substantive than "public interest, convenience, and necessity."

2. Whether the Commission's ruling is in conflict with the pre-emption provisions of the Federal Cigarette Labeling and Advertising Act.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The First and Fifth Amendments to the United States Constitution provide in pertinent part:

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[1] Any cigarette advertisements which make any claims with respect to health are forbidden by the manufacturers' own advertising code and by the FTC Cigarette Advertising Guides (see H.R. Rep. No. 449, 89th Cong. 1st Sess., p. 5 (1965)).

"Congress shall make no law . . . abriding the freedom of speech, or of the press . . .

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

2. Pertinent statutory provisions are set forth in Appendix C, pp. 45a-49a.

STATEMENT

After a turndown by television station WCBS-TV, New York, N.Y. of his demand for free time, "roughly in proportion" to the time devoted by the station to cigarette commercials, in which to discuss the hazards of smoking (J.A. 6, 7, 9), John F. Banzhaf, III, filed a complaint with the Federal Communications Commission ("Commission"), alleging such refusal contravened the Commission's "Fairness Doctrine" (J.A. 2-5). Acting solely on data supplied by Banzhaf, the Commission sustained his complaint, in a letter of June 2, 1967 to WCBS-TV, which stated in pertinent part (App. A, p. 15):

> "We hold that the fairness doctrine is applicable to such advertisements. We stress that our holding is limited to this product—cigarettes. . . . We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health."

From this action taken without prior notice, the National Association of Broadcasters, each of the major networks, and numerous other interested groups sought "rehearing" under 47 U.S.C. Sec. 405—contending that the "fairness doctrine" was not applicable to product advertising, and that the June 2 pronouncement contravened not only the First and Fifth Amendments, but also the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282-284, 15 U.S.C. Secs. 1331-39 (1965). These contentions were rejected by the Commission in a lengthy

Memorandum Opinion and Order adopted September 8, 1967 (App. A, pp. 37-105), a copy of which the Commission mailed to each of its more than 6000 broadcast licensees (App. A, pp. 41, 88), warning them that subsequent non-compliance with the action there taken "will receive consideration, in specific rulings where appropriate or at license renewal time" (App. A, p. 41).[1]

Upon review by the Court of Appeals for the District of Columbia Circuit, under 47 U.S.C. Sec. 402(a) and 28 U.S.C. Sec. 2342, the Commission's ruling was sustained by a divided court (per Bazelon and Wright, JJ., with Miller, J. dissenting without opinion).

On the premise that the health warnings which licensees are required to broadcast need not be inserted *in* the cigarette advertisements themselves, the court held that the Commission ruling did not "violate the letter" of the Cigarette Labeling Act nor conflict with the Congressional intent to protect cigarette manufacturers against conflicting requirements as to the content of cigarette advertising (App. B, pp. 7a, 13a).

Although recognizing, in First Amendment situations, that the "public interest" standard set forth in the Communications Act (e.g. 47 U.S.C. Sec. 307(a)) is too vague a standard with which to sustain administrative regulation of program *content* (App. A, p. 24a), the court held that " 'public interest' indisputably includes the public 'health' ", and that the Commission may invoke this more specific standard to regulate the content of broadcasting (App. B, p. 25a)—with product advertising not entitled to the same degree of protection as other forms of speech, and with the broadcast media accorded lesser protection than printed media (App. B, pp. 30a-38a). It is those holdings which petitioner requests this Court to review.

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[1] See Attachment I to the instant petition.

REASONS FOR GRANTING THE WRIT

I

A. In requiring radio and television stations that carry cigarette advertising to devote a "significant amount of time each week" to discussing the health hazards of smoking, the Commission was able to point to no statutory standard more specific or substantive than the "public interest, convenience, and necessity", the standard prescribed in the Communications Act for granting and renewing broadcast licenses (47 U.S.C. Sec. 307(a) and (d)).

As repeatedly stated by this Court, although the touchstone of "public interest, convenience and necessity" and other correspondingly broad standards may be specific enough in some contexts, they lack sufficient specificity where government agencies by such portmanteau words seek to regulate evils intertwined with First Amendment freedoms. *Staub* v. *Baxley*, 355 U.S. 313; *Butler* v. *Michigan*, 352 U.S. 380, 383; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502.

It cannot be gainsaid that where administrative agencies in the exercise of their licensing and other statutory functions, "judge the content of the words and pictures sought to be communicated," Congress must first have spoken "with narrow specificity". *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503; *Smith* v. *California*, 361 U.S. 147, 150-151; *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146. A violation of the First Amendment occurs where a government agency "undertakes to censor the contents of the broadcasting". *Kovacs* v. *Cooper*, 336 U.S. 77, 97 (Jackson, J. concurring). "The term censorship . . . connotes *any* examination of thought or expression in order to prevent publication of 'objectionable material'." *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525, 527 (emphasis by the Court). The action here challenged is only the first step to an absolute ban on the carriage ("publication") of cigarette com-

mercials, as evidenced by precisely such a rule-making proposal instituted by the Commission on February 5, 1969 (F.C.C. Docket No. 18434).

In short, where the Commission (as here) attempts to prescribe conditions under which cigarettes (a product lawfully sold in interstate commerce) may be advertised over the air, under a statutory standard no more specific or substantive than the "public interest", it impinges on the free speech guarantees of the First Amendment and the no censorship prohibitions expressly inserted by Congress in the basic statute under which the Commission functions (47 U.S.C. Sec. 326).

Unlike the Commission which was content to premise its authority solely on the "public interest" concept, the court below squarely ruled that this vague standard was insufficient to sustain the "unusual limitations" here placed on a licensee's discretion (App. B, pp. 18a, 24a-25a). However, to rewrite "public interest" to read "public health" and then in turn to restrict "public health" to "a unique situation" like cigarette advertising, as the court below did, is to exercise powers which the Constitution has entrusted to Congress and not to the Judiciary. *Securities and Exchange Com.* v. *Chenery Corp.*, 332 U.S. 194, 196; see also *Border Pipe Line Co.* v. *Federal Power Commission*, 171 F.2d 149 (App. D.C. 1948).

To suggest, as did the court below and as the Commission repeatedly does, that the protection which the First Amendment accords printed media differs from the protection accorded broadcast media presents a question of general importance which should at long last be considered and clarified by this Court. See Sullivan, "Editorials and Controversy: The Broadcaster's Dilemma", 32 *Geo. Wash. Law Rev.* 719, 721 (1964); Note, "Regulation of Program Content by the F.C.C.", 77 *Harv. Law Rev.* 701 (1964); Robinson, "The FCC and the First Amendment: Observation on 40 Years of Radio and Television Regulation," 52

Minn. Law Rev. 67 (1967). As the Commission has heretofore been warned by this Court in another context, where a grant of power is "accompanied by no substantive standard other than the 'public interest, convenience, and necessity' ", it is not to be lightly inferred that Congress thereby conferred on the Commission paramount control over "advertising content". *Head* v. *New Mexico Bd.*, 374 U.S. 424.[1]

As seemingly recognized by the court below, the First Amendment would clearly preclude a governmental agency from requiring printed media, even those claiming second-class mailing privileges, to set aside space each week for health hazard warnings in the event they carry cigarette advertising (App. A, pp. 30a-38a). *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146; cf. *Radio Television News Directors Assn.* v. *United States*, 400 F.2d 1002 (7th Cir. 1968), cert. granted No. 717, Jan. 13, 1969. Whether broadcast media have lesser protection is a highly important matter which this Court should resolve.

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[1] This is not to say, in program areas where Congress has already legistered with requisite specificity and where the Commission proceeds under those specific standards, and not (as here) under the general touchstone of "public interest", that the Commission may not look at programming or even at program content not within the ambit of the First Amendment's protection. For example, in 47 U.S.C. Sec. 312, Congress has expressly authorized the Commission to revoke licenses for broadcasting of "obscenity", "lotteries", and "fraud by radio", and to issue cease and desist orders against any licensee who has violated or failed to observe those criminal provisions, with a further right to revoke a license for any subsequent violation of a final cease and desist order issued in connection therewith. Elsewhere in the Act (47 U.S.C. Secs. 315 and 317), Congress has laid down explicit "equal time" requirements concerning "political broadcasts", and made sponsorship identification announcements mandatory. If the Commission were to examine into programming and revoke a license under those explicit provisions of the Act, it would be proceeding under specific statutory provisions which Congress has enacted covering those particular matters, and not under a broad "public interest" standard which this Court has indicated lacks sufficient specificity where First Amendment rights are involved.

B. No doubt aware that it was on slippery ground in extending its "fairness doctrine" to routine product advertising, the Commission stressed that its holding was limited to a single product—cigarettes (App. A, p. 15). In substituting a "public health" for a "public interest" test (App. A, p. 25), the court below likewise admitted that the Commission could not interdict "every broadcast which might . . . be thought to pose some danger to the public health." (App. A, pp. 26a, 27a, n. 63, 30a). Nowhere has the Commission or the court below adequately explained why, if the instant ruling is valid, like requirements could not be extended to dairy products (cholesterol), fluorides, beer, wine, vitamins, and insecticides—when mentioned on radio and television but not when advertised in the printed media. To single out cigarettes for unique treatment, different from all other product advertising, is a clear abuse of agency power, in derogation of the Fifth Amendment.

II

Only by an admittedly narrow reading of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), 15 U.S.C. Secs. 1331-39, was the court below able to conclude that the Commission's ruling here complained of was not in patent conflict with the language, aims, and purpose of that statute. Following the Surgeon General's report in 1964, because of the vast conflicting interests involved, Congress preempted the field of cigarette advertising by the aforesaid statute until 1969. It first prescribed the precise cautionary warning to be carried on every cigarette package. The 1965 Act then went on to provide that, prior to July 1, 1969, "No statement relating to smoking or health shall be required in the advertising of any cigarettes, the package of which are labelled in conformity with the provisions of this Act." 15 U.S.C. Sec. 1334(b). The Commission ruling here challenged orders the broadcaster to do precisely what that Act said should not be required until July 1, 1969. The instant proceed-

ing is the first case to test the meaning of the pre-emption provisions of the Federal Cigarette Labeling and Advertising Act. The mere fact that this statute is due to expire by its own terms on July 1, 1969 does not render a ruling by this Court on its scope and purpose any less needed—as borne out by numerous unresolved cigarette smoking and health hazard complaints presently pending before the Commission, and with thousands of license renewals yet to be submitted justifying their operations over all or a portion of the 1966-1969 period. See Attachment I.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 18, 1969

ATTACHMENT I

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

February 12, 1969

FCC 69-122 25870
In Reply Refer to: 8330

Time-Life Broadcasting, Inc.
Station WFBM-AM-FM-TV
1330 N. Merdian
Indianapolis, Indiana 46202

Gentlemen:

This refers to the complaint of Mr. John F. Banzhaff III, submitted on October 23, 1968, and supplemented by letter of October 30, 1968, alleging that Stations WFBM-AM-FM-TV have failed to comply with the fairness doctrine.

Mr. Banzhaf states that in two editorials (copies of which are attached) broadcast a combined total of 20 times, the stations defended their right to present cigarette advertisements; that they opposed a recommendation of the Federal Trade Commission that all cigarette advertising be prohibited on radio and television; that they failed to present the other side of the issue; and that when he complained to you, he was told that the Federal Trade Commission's position had been presented in the stations' newscasts and that the editorials represented your disagreement with that position. Mr. Banzhaf claims that this argument "would make the entire fairness doctrine a farce" since "one side cannot be expected to present the arguments in support of his opponent's position," and that the Commission should take action against you on the ground that you failed to comply with the fairness doctrine and that you placed your financial interest in cigarette advertising above the rights of the people.

In your response to the complaint, filed November 21, 1968, you state that the editorials were broadcast after you broadcast a number of news items reporting the FTC's recommendation and quoting statements in support of such recommendation from Senator Magnuson and HEW Secretary Cohen; that in the editorials you attempted to present a view "which was partially critical" of the views expressed in the news broadcasts; that the editorials presented the view that if cigarette advertising were to be banned, it should be banned in all media and not solely radio and television; that if Congress feels cigarette smoking is a hazard to society, it would be more logical to ban the manufacture, sale, and possession of cigarettes than "to make radio and television the whipping boys"; and that the attack on cigarette advertising appears to be "only one of numerous manifestations of an anti-advertising sentiment on the part of many government departments." You state that since you presented the FTC's views on banning cigarette commercials in your news programs, you were entitled to express your disagreement with these views and that the presentation of contrasting views met the test of the fairness doctrine. You add that the editorials made it clear to the public that you had "some private interest" on the question of banning cigarette commercials; contend that you made an honest and reasonable effort to comply with the fairness doctrine; and cite your record of presenting anti-smoking announcements and numerous programs relating to health and smoking during the period August 1967 to October 1968.

There is of course no question as to your right to editorialize in any fashion and as vigorously as you choose on any issue. *Letter to Storer Broadcasting Company*, 11 FCC 2d 678 (1968). The question is rather whether, having done so, you have afforded reasonable opportunity for the presentation of conflicting viewpoints on that issue. In resolving that question, the Commission looks to all broadcast material cited by the licensee, and has further

noted that the licensee has considerable discretion in the manner of achieving fairness, with the Commission's role limited to determining whether the licensee's actions have been reasonable. Letter to *Lawrence M. C. Smith*, 40 FCC 549 (1963).

In the context of this case, the matter thus turns on whether you afforded reasonable opportunity for the presentation of contrasting viewpoints on the issue whether cigarette commercials should be banned. You have cited in this respect the numerous announcements carried by the station pointing up the health hazard in smoking, the news items reporting the FTC's recommendation and quoting statements of support, and the information in the editorials themselves, such as the statement that ". . . the Department of Health, Education and Welfare in a recent report said that a man between the ages of 25 and 35 who smokes more than two packages of cigarettes a day can expect to have his life shortened by 8 years. Even a light smoker can expect to lose 4 years of life". However, the delineation of the health hazard in smoking, while of course pertinent to the issue of banning cigarette commercials, does not constitute an adequate presentation of the contrasting viewpoint on that issue. Indeed, the health hazard aspect, as your editorials in effect state, is only the point of departure in determining what remedial action is appropriate. You have stated why banning cigarette commercials is not appropriate remedial action (see, e.g., attached editorial of July 15, 1968), but nowhere have you shown a presentation of the opposing side of that issue. The news items referred to basically recite the FTC recommendation (without exposition of the reasons given by the Commissioners who supported the recommendations—one TV news item recites some background data on cigarette commercials and expenditures), the statement by Senator Magnuson that his Committee would give the proposal "serious consideration," and statements of Secretary Cohen concerning the need for stronger health warnings on cigarette packages and in cigarette advertising. This

again cannot be said to be an adequate presentation of the contrasting viewpoint on the issue of whether the banning of cigarette commercials on radio and televison would be a sound step.

The Commission appreciates that you have acted in good faith in this matter, and, particularly, that you believed that by presenting the information as to the health hazard and the news items you had complied with the requirements of the fairness doctrine. However, recognizing fully the discretion afforded you on this area, we cannot find that you achieved fairness on the basis of the showing before us. The choice of how to do so—whether to present further material yourself, to select appropriate programming or an appropriate spokesman, etc.—is one for your good faith, reasonable judgment. It is requested that you notify the Commission as to the steps taken to achieve compliance with the requirements of the fairness doctrine in this instance.

Commissioner Bartley absent; Commissioner Johnson concurred in the result.

By Direction of the Commission.

BEN F. WAPLE
Secretary

Attachments
cc: John F. Banzhaf, III

Editorial

THE WFBM STATIONS

Time-Life Broadcast Inc. - 1330 N. Meridian St.
Indianapolis, Indiana 46202 - 635-9326

July 15, 1968

"CIGARETTE ADVERTISING #1"

Do radio and television commercials cause lung cancer?

Not likely. But the Federal Trade Commission, by a 3-to-2 vote, has recommended that Congress ban all cigarette advertising on radio and television. So you might *think* the commercials are at fault.

Actually, however, cigarettes are the health hazard. The Department of Health, Education and Welfare in a recent report said that a man between the ages of 25 and 35 who smokes more than two packages of cigarettes a day can expect to have his life shortened by 8 years. Even a light smoker can expect to lose 4 years of life.

This being a fact, then, the government should warn people of the hazards of cigarette smoking. And this it and a number of private agencies, such as the American Cancer Society, are doing.

But if Congress feels that the hazard to society is so great it can't stop there, then it would seem logical to ban the manufacture, sale and possession of cigarettes.

We see *no* logic at all in the Federal government subsidizing the tobacco farmers and permitting the manufacture and sale of cigarettes, then turning around and banning cigarette advertising—and not even *all* cigarette advertising at that, only cigarette advertising on radio and television.

The implication of the Federal Trade Commission proposal would seem to be that either radio and television commercials are more deadly than cigarettes, or that without radio and television advertising of cigarettes, so few people would buy them that the health hazard wouldn't matter. We don't believe either idea makes much sense.

The F.T.C. proposal evades the *real* issue—what should be done about cigarettes. And for Congress to adopt such a policy without banning cigarette advertising in *all* media and without also cracking down on the tobacco industry would be both discrimination and gross hypocrisy.

Editorial Times:

TV-Channel 6: 6:15 P.M.; 10:15 P.M. (Weekdays)

AM-Radio-1260: 6:10 P.M.; 9:07 P.M.; 6:05 A.M.; 1:07 P.M.; 3:07 P.M. (Weekdays) On Saturdays: 6:05 A.M.; 12:05 P.M.

FM-Radio-94.7: 5:05 P.M.; 10:05 P.M.; 11:15 A.M. (Weekdays) On Saturdays: 11:15 A.M.

Editorial

THE WFBM STATIONS

Time-Life Broadcast Inc. - 1330 N. Meridian St.
Indianapolis, Indiana 46202 - 635-9326

July 16, 1968

"CIGARETTE ADVERTISING #2"

To us at WFBM, the most frightening thing about the Federal Trade Commission proposal that cigarette advertising be banned from radio and television is *not* the threatened loss of revenue, or even the obvious discrimination against our industry. Rather, it is the *anti*-advertising sentiment reflected in that proposal.

Cigarette smoking may be hazardous to health. But people smoked cigarettes long before there were such things as radio and television. And if it took radio and TV advertising to sell a product today, the liquor industry in this country would be just about out of business. Broadcasters agreed *voluntarily* long ago not to carry liquor advertising. And to this day, most of them don't.

Cigarette advertising on our stations has dropped considerably in recent years. And as it has fallen off, other advertisers have always bought up the available time. We feel this would continue to be the case if all cigarette advertising was taken off.

But we believe advertising is an essential part of our free-choice economy. It tells consumers where to find the products and services they seek. It provides information on new products and services. And, to get even more basic, it encourages people to buy, which stimulates business, which is then able to provide more jobs, which in turn gives more people more money with which to buy the things they want and pay taxes.

The F.T.C. proposal to ban cigarette advertising on radio and TV is only one of many recent attacks on advertising. One official of the Justice Department has suggested that advertising be limited as an anti-trust remedy. And advertising seems to be under constant fire anymore from consumer groups inside and outside the government.

We don't claim commercial advertising is free from abuses. But many of the services it provides are essential to our economy and our free society. Without advertising, only the federal government would have the resources to provide those services. And that means more taxation.

Even in the Soviet Union, a country where the government has tried to do this job, the Moscow leadership is now encouraging the use of American advertising techniques and introducing other sales incentives seeking to improve the national output.

Editorial Times:

TV-Channel 6: 6:15 P.M.; 10:15 P.M. (Weekdays)

AM-Radio-1260: 6:10 P.M.; 9:07 P.M.; 6:05 A.M.; 1:07 P.M.; 3:07 P.M. (Weekdays) On Saturdays: 6:05 A.M.; 12:05 P.M.

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